Supreme Court, U.S.
FILED
MAY 10 1992
OFFICE OF THE CLERK

No. 92-1598

IN THE
Supreme Court of the United States
October Term, 1992

THOMAS W. CURLEY,
Petitioner,

-against-

CONSOLIDATED RAIL CORPORATION and
EXCELSIOR TRUCK LEASING COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

L. KEVIN SHERIDAN
Attorney for Petitioner
50 Route 111
Smithtown, New York 11787
(516) 724-8833

Of Counsel:
SABLE, GOLD & DINHOFER
450 Seventh Avenue
New York, NY 10123
(212) 244-2740

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....i

1. "TOTAL SPECULATION," LIABILITY AS AN INSURER, and LAVENDER AND BASHAM..1

2. RESPONDENTS' MISREADING OF BASHAM AND THIS COURT'S OTHER FELA DECISIONS.....4

3. RESPONDENTS' ATTEMPT TO RETRY THIS CASE IN THIS COURT.....8

4. THE IMPORTANCE OF THE QUESTIONS OF LAW HERE PRESENTED FOR REVIEW.....12

5. BURDEN ON THIS COURT.....17

CONCLUSION.....20

TABLE OF AUTHORITIES

Cases:

Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U.S. 351 (1930).....19

Atkins v. Kansas, 191 U.S. 153 (1903)..12

Basham v. Pennsylvania R. Co., 372 U.S. 699 (1963).....passim

Brady v. Southern R. Co., 320 U.S. 476 (1943).....14

Page

Davis v.Baltimore & Ohio R. Co.,
379 U.S. 671 (1965).....5 et passim

Edmonson v. Leesville Concrete
Co., ___ U.S. ___, 114 L.Ed.2d
660, 111 S.Ct. 2077 (1991).....4

Gallick v. Baltimore & Ohio R. Co.,
372 U.S. 108 (1963).....8 et passim

Howlett v. Rose, 496 U.S. 356
(1990).....15

Lavender v. Kurn, 327 U.S. 645
(1946).....passim

O'Connell v. National R.R. Pas.
Corp., 922 F.2d 1039 (2d Cir. 1991)....16

Rogers v. Illinois Central R. Co.,
352 U.S. 500, reh. denied, 353 U.S.
943 (1957).....passim

Smith v. National R.R. Pas.
Corp., 856 F.2d 467 (2d Cir. 1988).....16

Tennant v. Peoria & P.U.R. Co., 321
U.S. 29 (1944).....8 et passim

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978).....12

Webb v. Illinois Central R. Co., 352
U.S. 512, reh. denied, 353 U.S. 943
(1957).....passim

Webb v. Illinois Central R. Co., 228
F.2d 257 (7th Cir. 1956), rev'd.
352 U.S. 512, reh. denied, 353 U.S. 943
(1957).....1

Page

Other:

4 F.V. Harper, F. James & O. Gray, The Law of Torts (2d ed. 1986).....2, 3

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

1. "TOTAL SPECULATION," LIABILITY AS AN INSURER, AND LAVENDER AND BASHAM.

Petitioner has not urged that a FELA finding of liability can be based on "total speculation" or that this statute imposes insurer liability on an employer.

What we have urged with respect to speculation is only what this Court stated in Lavender v. Kurn, 327 U.S. 645 (1946), to wit: " It is no answer to say that the jury's verdict involved speculation and conjecture"; what matters is whether there are "probative facts" which support the jury's finding. Id., at 653. What counts is whether "fair minded men" could draw the inference of causation. Id.[1]

---

[1] See also Webb v. Illinois Central R. Co., 352 U.S. 512, 515 n.6, reh. denied, 353 U.S. 943 (1957), revg 228 F.2d 257 (7th Cir. 1956).

Consistent with Lavender, our point is that, once the employer's negligence has been established by sufficient evidence, it is no proper objection to a jury finding of causation that such finding may have required some speculation. See, making the same point, 4 F.V. Harper, F.James & O.Gray, The Law of Torts (2d ed. 1986), Sec. 20.2, at 97-98.

Here, both New York appellate courts, like this jury and the trial court, were satisfied that there was sufficient evidence to find that Conrail was negligent. And, as to causation, there was in fact entirely sufficient evidence supporting this jury's finding of causation. That evidence included not only the circumstantial evidence tending to establish that this accident could, and quite likely did, occur as petitioner claimed it did, but also, as Judge Bellacosa noted in his dissent in the

Court of Appeals (see A14-15), this evidence included "direct" testimony, to wit, that of the petitioner himself, establishing that in fact this accident and his injury had occurred as he claimed they had. Compare Basham v. Pennsylvania R. Co., 372 U.S. 699 (1963).[2]

Plainly, under Basham and Lavender and this Court's other here controlling FELA precedents no impermissible speculation was required for this jury to find that Conrail's amply established negligence had caused petitioner's injury. All that this required was that the jury accept as true the petitioner's testimony as to how his injury had occurred, which this jury obviously did.

---

[2] See also 4 F.V. Harper, F. James & O. Gray, The Law of Torts (2d ed. 1986), Sec. 20.2, at 93 n.7: "Thus, where there are eyewitnesses to an accident, their testimony will generally suffice to establish defendant's breach of duty and direct causation of plaintiff's injuries."

2. RESPONDENTS' MISREADING OF BASHAM AND THIS COURT'S OTHER FELA DECISIONS.

At page 18 of its brief Conrail states that Basham

> is of no assistance to Petitioner, because [in that case] there was direct eyewitness testimony that the accident occurred as plaintiff claimed. Here, there was no eyewitness to the alleged accident that could confirm Petitioner's self-serving testimony as to how the alleged incident occurred. [3]

With all respect, this is arrant nonsense. Basham does not either impose or recognize any " disinterested eye-witness" requirement. Rather, what Basham stands for is that it is for the jury to determine credibility and find the facts. See Edmonson v. Leesville Concrete Co., ___ U.S. ___, ___, 114 L.Ed.2d 660, 676, 111 S.Ct. 2077, 2085 (1991).

---

[3] See also id. at 15, concerning petitioner's testimony as to his complaints concerning Car 360, and, to the same effect, Excelsior's brief at 5 and 13.

Appellate courts may not set aside a FELA jury finding of liability based on the fact that a critical part of the plaintiff's case was supplied by his own testimony. That would be directly contrary to what Basham stands for.

Conrail's suggested eyewitness corroboration requirement is inconsistent with what this Court has held as to the role of the jury in FELA cases. See Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 507-509, reh. denied, 353 U.S. 943 (1957); see also Davis v. Baltimore & Ohio R. Co., 379 U.S. 671 (1965).

It is inconsistent with Rogers' holding that even circumstantial evidence is sufficient, without more, to establish a prima facie case. See 352 U.S., at 508, text and note 17. Further, such a rule is inconsistent with Rogers' and Lavender's teaching that all that is required to establish FELA causation is evidence

which a jury can "with reason" rely upon, without regard to the source or type of such evidence.

The fact of the matter is, as Judge Bellacosa pointed out (see A5 and A16-18), Basham is here controlling; it establishes that this jury was fully entitled to credit petitioner's testimony.

As to Conrail's argument that petitioner was required to establish the "precise" or "specific" cause of Car 360's sudden stopping (Conrail's brief at 14-15), suffice it to say, again Basham is controlling. Since in that case there was no proof concerning what might have caused the platform on which Basham had been working to move, Basham cannot be squared with any requirement that this petitioner had to prove the precise cause of Car 360's suddenly stopping.

Similarly, this Court's precedents

squarely refute Excelsior's argument (Brief at 18) that, in order for the evidence to be sufficient, "the inferences which could be drawn from the evidence, both those supporting plaintiff's case and contradicting it," must be of "similar or equal probative weight."

This argument ignores that many real world questions cannot be reduced to or determined on the basis of mathematical probabilities. It ignores that, as a matter of pragmatic necessity, issues of fact must be resolved by juries even when probabilities cannot be determined.[4]

More to the point, even, Excelsior's argument was rejected in Rogers. See 352 U.S., at 506:

> It does not matter that from

---

[4] Compare Zinnel v. United States Shipping Board Emergency Fleet Corp., 10 F.2d 47, 49 (2d Cir.1925) (L. Hand, J.): ". . . nor are we justified, where certainty is impossible, in insisting upon it."

> the evidence the jury may also with reason, on grounds of probability, attribute the result to other causes ....

See also Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, at 35 (1944); Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, at 114-115 (1963).

Finally, as a matter of actual fact, Excelsior's probability based analytic model cannot be reconciled with the facts of Basham or Lavender or Gallick.

3. RESPONDENTS' ATTEMPT TO RETRY THIS CASE IN THIS COURT.

Notwithstanding respondents do not challenge our statement (Petition, pp. 7-8) that Conrail's expert Shaw conceded on cross-examination that this accident could indeed have happened as petitioner claimed if a piece had broken off and jammed in the gears of the differential (Trial Tr., 863: "Yes inside of the axle if you had breakage of parts into the

gears [of the differential] that would cause a car to slow down."), both respondents continue, even in this Court, in effect, to retry this case, by relying on Shaw's testimony that this accident could not have happened as petitioner claimed. See Conrail's brief at pp. 5-6; Excelsior's brief at pp. 13-16.

The answers to this argument are clear: Even without Shaw's concessions on cross-examination, this jury would still have been entitled to reject Shaw's opinion and to credit petitioner's testimony. See Basham and Davis. In light of Shaw's concession that this accident could well have occurred as petitioner claimed, this case is in fact far stronger than was Basham. Under Basham and this Court's other decisions concerning the role of the jury in FELA cases, and on this record, this jury's resolution of this factual issue must be accepted.

For very much the same reasons, Excelsior's argument based on its reading of Mr. Kitka's testimony as evidencing that he had claimed to have physically inspected the emergency brake cable on this car (see Excelsior's brief at 14) is of no moment. As we read Kitka's testimony, he did not claim to have personally inspected this cable. But, even if his testimony should be so read, that still does not render the evidence supporting this jury finding of causation legally insufficient.

Whatever Kitka testified to, that testimony, like petitioner's, was before this jury. It was up to the jury to believe or disbelieve that testimony, to give it such weight as it deemed appropriate, to accept or reject it, in whole or in part. Whatever Kitka did with respect to inspecting this emergency brake cannot detract from the fact that

there was in this case entirely sufficient evidence on causation.

There is no justification for the respondents attempting to retry this case in this Court. They had their chance to persuade this jury that this accident did not occur as petitioner claimed. They failed. And they failed in the face of proof which was entirely sufficient to allow this jury reasonably to infer that Conrail had been negligent and that its negligence played at least some part ("any part"), see Rogers, 352 U.S., at 506, in causing this accident and petitioner's injury.

In its brief (at 21), Excelsior accuses petitioner of "seeking one further bite at the apple." This is ironic. In fact, it is Conrail which has been given a second bite at the apple. Having lost this case before the jury, it has been allowed to "retry" it in the New

York appellate courts. What respondents are here doing is nothing more than an attempt to continue that unauthorized and unlawful retrial, now before this Court.

4. THE IMPORTANCE OF THE QUESTIONS OF LAW HERE PRESENTED FOR REVIEW.

The significance of the issues of law presented by this case goes beyond the importance of this case to the parties. These issues go to the roles of the Congress and of this Court in our federal/state system and under our tri-partite system of government. They go to the role of the courts, including this Court, in seeing to it that effect is given to the will of Congress. See, e.g., Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978) (role of the courts is to enforce Congress' will); Atkins v. Kansas, 191 U.S. 207. 223 (1903) (public interests "imperatively demand" that legislative enactments be

recognized and enforced by the courts as embodying "the will of the people").

In fact, it is not even possible to consider this case solely in terms of petitioner's interest. Petitioner is a member of a class, a very large class, including not only railroad workers, but also Jones Act maritime workers. That class, all of its members, was intended by Congress to be benefitted and protected by these remedial statutes.

There is an identity between the interests of petitioner, and of this class of which he is a member, and the interests and intent of Congress. The petitioner's interest cannot be ignored without also ignoring Congress' intent.

This case presents what this Court has repeatedly recognized as an interest warranting the grant of review. See Rogers, 352 U.S., at 509:

> Cognizant of the duty to

> effectuate the intention of the Congress to secure the right to a jury determination [in FELA actions], this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination.

See also Gallick, 372 U.S., at 109, and at 114 (discussing Tennant).

This case also warrants review based on this Court's responsibility under the Supremacy Clause to see to it that this federal statute is uniformly applied. See Brady v. Southern R. Co., 320 U.S. 476, 479 (1943).

Even if this case did not present the spectacle, noted by Judge Bellacosa (see A17-18), of now repeated defiance by the New York courts of this Court's clear teachings, it would still be a case calling for the grant of certiorari, based on this Court's responsibility to effectuate Congress' will concerning the

right to trial by jury in FELA cases and to assure that FELA litigants receive similar treatment in all states. Since this case does in fact also present a clear issue of apparently deliberate defiance by a state court of the constitutional authority of this Court and Congress, thus raising the most fundamental of Supremacy Clause issues, see Howlett v. Rose, 496 U.S. 356 (1990), it is plainly a case calling for review by this Court.

Beyond the above considerations, the New York Court of Appeals' decision in this case has the potential for causing delay and disruption in the courts, federal and state, by reason of the confusion it invites as to what is the standard of sufficiency of evidence in FELA and Jones Act cases.

Moreover, at least as long as this decision stands uncorrected, it will have

the practical effect of closing the New York state courts to many FELA and Jones Act plaintiffs. Indeed, as long as this decision is followed by the courts of New York, any plaintiff would be foolhardy to bring an even arguably close FELA or Jones Act case in the courts of that State. Compare O'Connell v. National R.R. Pas. Corp., 922 F.2d 1039 (2d Cir. 1991); Smith v. National R.R. Pas. Corp., 856 F.2d 467 (2d Cir. 1988).

Plainly, notwithstanding this Court's controlling precedents, one could not bring a Davis or Basham or Gallick or Webb or Lavender or Tennant type case in the New York courts if the instant decision were to be followed. All of those cases would have to be dismissed by the New York courts if the reasoning here of the New York appellate courts were to be followed.

5. BURDEN ON THIS COURT.

Excelsior's argument that review should be denied in this case in order not to unduly burden this Court (Brief at 19-21) is baseless. As Excelsior itself notes (id., 21), the views of Justices Frankfurter and Harlan on which it relies in making this argument were expressed in dissents, not opinions of this Court.

More to the point, even, the grant of review in this case would not impose any undue burden on this Court. Indeed, it is difficult to conceive how as a practical matter the grant of review in this case could impose any burden on this Court beyond that already imposed on the Court by reason of its having to determine this application for certiorari.

Essentially, this is the very simplest and most straightforward sufficiency of evidence case. It does not present any novel issue of law or fact.

There is no dispute that petitioner and his fellow officers testified as they did, or that Conrail's experts made the critical concessions we have noted concerning how this accident could have happened.

All this case involves is securing compliance with law already long-settled by this Court. The issues it presents are important. They are gravely important. But, in no way, we submit, is this a difficult case.

Indeed, should this Court grant certiorari, it could well be that the Court would decide that this case should be disposed of by a summary reversal, just as was done in Davis. See 379 U.S. 671. That could be done, in a manner fully consistent with this Court's roles as both declarer of what is the law and guardian of federal supremacy, by means of a summary order pursuant to Rule 16.1.

In such an order, this Court could point out that (i) under Basham and Lavender the evidence in this case was legally sufficient and (ii) the New York courts' reliance on Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U.S. 351 (1930), as authority for setting aside this jury verdict was misplaced.

In no event, however, would the grant of certiorari in this case unduly burden this Court. This is a specious argument. If the requisite number of members of this Court should agree with petitioner that this case presents issues warranting review by this Court, there is we submit, no reason why this Court should not grant review in this case.

Whether or not this was done intentionally, what was done in this case by the New York appellate courts stands in direct defiance of the intention of Congress and the authority of both that

body and this Court. Such defiance can not be allowed to stand uncorrected.

CONCLUSION

For the same reasons which impelled this Court to grant certiorari in, for example, Rogers, Davis, Basham, Webb, Lavender and Tennant, as well as for the other reasons set forth in this reply brief and in our petition, this Court should grant the writ of certiorari to review the decision and order of the New York Court of Appeals in this case.

Respectfully submitted,

L. KEVIN SHERIDAN
Attorney for Petitioner
50 Route 111
Smithtown, N.Y. 11787
(516) 724-8833

Of Counsel:

SABLE, GOLD & DINHOFER
450 Seventh Avenue
New York, N.Y. 10123
(212) 244-2740

May 10, 1993